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DISCUSSION AFTER THE SPEECHES OF RICHARD CUNNINGHAM AND LAWRENCE HERMAN

COMMENT, MR. CUNNINGHAM: I would like to make one comment on an issue that was discussed here earlier regarding the extent to which individuals and corporations should be able to sue governments. This issue is in great dispute. I think we need to parse that down into three separate issues and understand what the reality is. The first issue concerns whether governments, rather than companies and individuals, should be the initiating force in these cases. If that is the case, that is not the situation now at all. Governments do not go against other governments unless they have an industry or company coming to them saying that they have a particular problem in trade or investment and they want the government to go out and solve it.

The second question, which is justly put, is, do you want government to have a filter? Do you want government to have a say about whether it can pick up the issue raised by an individual or company? That is the situation now. You need to understand that, in big cases involving very big companies, the governments are pretty much going to raise the issue if those big companies make enough of a political fuss.

The last issue is, to what extent should the company's forces, its counsel and its economists, be involved in the litigation? There seemed to be an assumption, for example, talking about the Kodak case, that the Kodak lawyers did the work, wrote the briefs, and did everything else. However, they did not go into the room and argue it to the panel. The normal procedure is that the company's counsel and the USTR work very closely together. A large percentage of the work is, in fact, done by the petitioning company's counsel. I suspect that is maybe a little more true in the United States than in other countries. It is probably not much more true than in Canada, but it is a good bit more true than in Europe. That is the norm that is developing in this business, and I think it works pretty well now.

COMMENT, MR. HERMAN: That is an excellent point, and I think that it directly relates to the question of the utilization of the process. As there is a shift of resources from the public to the private sector, and, as governments have fewer resources to do all of the work, there is going to be a greater use of private sector resources to fight these disputes and to prepare the background and the factual material that forms the basis of the case. I think that is an additional factor that is going to put additional pressure on governments, because you could have a great amount of researched, detailed factual material presented that was not presented before. It is an additional burden that is

going to be placed on the responding government. It will have to justify its rules. I do not think that is a bad thing; I am just saying that it is a factor.

COMMENT, PROFESSOR KING: I have one comment. I had an experience a number of years ago in Mexico dealing with the national treatment and transparency problems. I never could find out what the rules were. All I knew was that, generally, the foreign company, particularly the U.S. company, got screwed. So, I would be opposed to opening up a Pandora's Box on national treatment. I think we have gone a long way.

The other thing that I favor is institutionalizing dispute settlement mechanisms. At the same time, I also think it is important that individuals – my background is Nuremberg – have standing, as they do under Chapter 11, to bring suits against countries. I think it is important that we make individuals aware of the values of international law and what these agreements mean to them. I am speaking about individuals in the companies that are aggrieved by a violation of the national treatment provisions and also expropriation rules and Chapter 11 itself.

COMMENT, MR. BRIZZ: I am a non-attorney, so let me ask a non-legal question of attorneys. It may be foolish, but I will try anyway. We see fear and the use of nationalism and political expedience, be it by Slobodan Milosevic, Jesse Helms, the Parti Quebecois, or whoever in that seemingly ever-present force in any of our societies. The value of international dispute resolution is something to which the average citizen has little access. They have little awareness of the value that they see. Now, particularly, with the use of the Internet and other vehicles, they can understand the negative impact on them.

But it would seem as if we are not going to have the cause to which you spoke. There needs to be education. Otherwise, the fear of loss of jobs, sovereignty, or control is going to be something that will be easily aggravated by the backlash.

COMMENT, MR. CUNNINGHAM: I agree with that. I think companies, not just individuals, need education. For this to be a good deal that countries have struck with international bodies, the companies and individuals have to receive benefits for it. There are jobs created for us so we have more export markets. Our economy works better. That is where we are going to get judicial-type resolution of disputes.

My concern is not just that individuals be educated. My concern is that companies are still somewhat slow to take advantage of this dispute resolution mechanism. There are more disputes than there were under the old GATT, but the great bulk of trade litigation in the United States is still import relief litigation. I think that is true, not because companies do not seal their interest in more export markets, but because companies have not gotten the

idea yet that going to the government to help you solve a problem, which is the way they see these dispute resolution mechanisms, is something beneficial to them. I think there is a lot of education that needs to be done to point out these benefits to these companies.

COMMENT, MR. HERMAN: We used to hear Americans say that U.S. companies are not educated on imports. It is woefully worse in Canada. I always thought you were, in many ways, very far ahead of us in terms of the private sector understanding international trade rules. We have a serious problem in our country. And in downsizing in recession, as a result of fewer corporate resources being available to following international trade, that is a problem.

COMMENT, MR. ROBINSON: On the education point, I would just like to comment a bit on what Larry was saying about the Canadian reaction. I guess I am disagreeing with him a bit. I think the high level of public concern about the MAI, for example, which contains Chapter 11-type private dispute settlement rights, is real. But, I think it is based on a very late start in the government providing its education. Of course, Canadian corporations, as Larry and I agree completely, with a few exceptions such as the CPR, do not know anything about this area and do not make any effort to learn. They all should be hiring us for a significant fee so we could tell them, but they do not.

However, and this is something my American colleagues will not know about, there is a lady named Maude Barlow running the Coalition of Canadians. It is a jingoistic protection . . . .

COMMENT, MR. HERMAN: Careful, Mike. This is recorded.

COMMENT, MR. ROBINSON: That is all right. She is supported, interestingly enough, by the legal counsel for Ethyl Corporation of Canada, and she has been putting out all kinds of misinformation about what the MAI is. She has been saying things like, foreign corporations will be able to flout Canadian environmental protection laws.

There has been no attempt made whatsoever to say we are only talking about expropriation of investments and we are talking about national treatment and individual corporations, be they Canadian or American-controlled, or controlled from anywhere, and they will merely be subject to the same rule, national treatment. I submit, Larry, that if that kind of misinformation had been put out in the states, you would have the million-person-march up and down the mall. Americans would react even more strongly to the thought that, if this MAI were signed, all sorts of nasty foreigners were going to be able to bypass American law. So, I think it is up to Canada, and I know you have a lot of Canadian people here, and I know Sergio Marchi, the Minister

for International Trade, started on it. The poor bill is getting beat up in church basements. You should have helped him, by the way.

Now that Ms. Barshefsky said it was not good enough for America, it will not be signed. We have to go out and sell the treaty properly and get rid of this misinformation that has been put out in Canada.

QUESTION, MR. McILROY: Henry, first of all, I wanted to make a comment on Mike Robinson's comments regarding Maude Barlow and the Council of Canadians. One thing that I have noted is that the target has changed in the debate. The target used to be free trade treaties. That is now, I think, very difficult to attack because Canada has had free trade with the United States for a decade, and the sky has not fallen. I also think it is hard to attack the United States, given your experience in the first five years of NAFTA, particularly your employment rate at the present time. So I think the debate has shifted.

It is now, as Larry said, being discussed in the church basements. Now, faceless, nameless, and stateless multinational corporations are scaring people. And the other targets, I think, are these distant bureaucrats toiling away in Geneva. Those seem to be the points of attack, corporations and distant, unaccountable bureaucrats as opposed to free trade treaties. I think that Maude Barlow has done a very good job in arousing an emotional reaction in Canada regarding particular corporations.

My comment is regarding this issue of direct access and standing in dispute resolution. I have a question both for Larry and Dick. Is the issue really allowing corporations access to dispute resolution, or is it more that there is no consensus on the substantive rights that are now starting to enter into areas of provincial and state jurisdiction, for example, nondiscrimination in areas of government procurement, where local authorities very much want to engage in favoritism for local companies? I am wondering whether it is an issue of substance as opposed to process. That is, I think there is no consensus on non-discrimination. I think a lot of people still want to discriminate, particularly at local levels, and they do not want to have a treaty telling them they cannot give a contract to a local company, even though the local company does not have the lowest bid. I was wondering if you might want to comment on that.

ANSWER, MR. CUNNINGHAM: It sure sounds more like a Canadian problem than an American problem to me. Larry?

ANSWER, MR. HERMAN: We are talking about the MAI. I think that some of these problems with the so-called draft tax, and there really is no draft tax; it is a series of things stuck together; we just call it a draft tax. I think you can improve on some of these provisions.

The point is that the people who are criticizing are not prepared to listen. That has been my experience. No matter what is done to it, I do not think you are going to find that you can win this one with those groups. Now, whether those groups who are opposed to international dispute settlement amount to enough to worry about is another matter. They are very vocal and very well-organized.

But I think, Jim, that both the substantive and procedural issues, can be addressed. I do not think there is a problem. I frankly do not think that it is necessarily greatly virtuous that companies and persons can have direct access to the dispute settlement process. I believe it is a great idea, but it is not a *sine qua non.*

I do not see why you could not have governments take up disputes with the support of companies who are aggrieved, and, if there is merit to the dispute, let it run. That is what I suggest.

QUESTION, MR. WOODS: I have two brief questions. The first is with respect to the comments that were made, particularly about the old GATT and national treatment. To what extent do the panelists foresee some of the changes that you are talking about in terms of the national treatment obligation happening judicially, that is, through the interpretation of the WTO and other agreements, and to what extent are you comfortable with that idea in light of the implications for sovereignty?

I guess the second question is about exceptions. Do you have any comments about what is probably the ultimate expression of sovereignty that I could see in the WTO agreement, and that is the national security exception, which perhaps ironically could be seen in another light national sovereignty impinging on the WTO rules?

ANSWER, MR. CUNNINGHAM: Could I address that second one first, because I was thinking national security as you were talking about the exceptions? First of all, national security always seems to be different from the other exceptions. It is going to be different because we are dealing with governments here, and governments are always going to regard that as qualitatively different than the other exceptions. Maybe we will get to the point where the environmental stuff will be in that category, and one of the great changes of the debate we are having now regarding trade is the injection of environmental issues into it, where you no longer have the bad guys against the good guys. There are now people who are regarded as the quintessential good guys on the trade restricting end of the debate, even with the environmentalists. That has radically changed issues.

I do not think we ought to do much with national treatment. You do not start monkeying around with that, in my view. What I do think is that those exceptions will change in their importance and fluctuate over the years. They

always have, and they always will. Some will be more important, some will not. National security will always be important. Some others will become important, too. In general, though, until the WTO, like the Supreme Court, reads the election returns and in such a way sees that the environment has become as important to the body politic as national security, they are going to construe it more narrowly. But I think that is natural. I do not see anything wrong with that.

ANSWER, MR. HERMAN: I am not suggesting that we monkey around with national treatment. In the Section 337 case, the panel said that national treatment in the context of Article 34 of the GATT meant effective equality of opportunities, and I could see some traditional evolution of that concept of effective equality of opportunity. I am just saying that maybe applying that narrowly to a product that crosses the border as it enters into commerce is not necessarily the only way of interpreting what the panel has said and is an arm of effective equality of competitive opportunity. So, I could see some judicial help with the process.